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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of ) MM Docket No. 92-195  
 )  
Amendment of Section 73.202(b), ) RM-7091  
Table of Allotments, ) RM-7146  
FM Broadcast Stations. ) RM-8123  
(Beverly Hills, Chiefland, Holiday,) RM-8124  
Micanopy, and Sarasota, Florida) )

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Application of )  
 )  
Heart of Citrus, Inc. ) File No. BPH-940307IZ  
 )  
For modification of the facilities )  
of Station WXOF(FM), )  
Beverly Hill, Florida )

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TO: Douglas W. Webbink, Chief      Dennis Williams, Assistant Chief  
Policy and Rules Division      Audio Services Division  
Mass Media Bureau      Mass Media Bureau

REPLY OF DICKERSON BROADCASTING, INC.  
TO "OPPOSITION TO PETITION FOR RECONSIDERATION"

1. Dickerson Broadcasting, Inc. ("Dickerson") hereby replies to the Opposition filed by various parties (referred to collectively herein as "Opposers") with respect to the Petition for Reconsideration filed by Dickerson relative to related actions taken in the two above-captioned matters. In those actions (a) the Chief, Policy and Rules Division, dismissed an Application for Review filed by Dickerson with respect to the above-captioned FM channel allotment proceeding, and (b) the Assistant Chief, Audio Services Division, granted an application pursuant to the allotment proceeding which was the subject of Dickerson's wrongly-dismissed Application for Review.

2. In its Petition, Dickerson pointed out that the PRD

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lacked authority to dismiss (or otherwise dispose of) Dickerson's Application for Review. See Dickerson Petition at 6-7, citing Section 0.283(b)(3) of the Commission's Rules. In their Opposition, the Opposers inaccurately assert that Dickerson had somehow consented, anticipatorily, to the dismissal of its Application for Review, and that, "[a]s the Dickerson appeal was dismissed as moot rather than on the merits, consideration by the full Commission was unnecessary." Opposition at 4.

3. While the Opposers no doubt would like to believe that their position enjoys some support, somewhere, in some case, some rule or some other precedent, the fact is that the Opposers cite no such case, rule or other precedent. And Dickerson is not aware of any authority which would support the Opposers' odd position. Rather, the Commission's rules setting forth the delegations of authority to subordinate offices within the Commission (such as the PRD) clearly mandate that applications for review be referred to the full Commission for disposition. See Section 0.283(b)(3). That rule does not contain any language which even begins to support the Opposers' fanciful argument.

4. Moreover, even if the Opposers had some arguably solid support for their legal position -- and they do not -- they are also clearly wrong on the facts. As Dickerson made unquestionably clear in its Petition, the self-serving gloss which the Opposers (and the PRD) attempt to place on certain language (e.g., "current mileage separations") in Dickerson's Application for Review is simply wrong. See Dickerson Petition

at ¶10. In its Application for Review, Dickerson indicated that, if Dickerson were assured of certain protection, then Dickerson would withdraw its Application for Review. Dickerson Application for Review at 9, n. 3. In other words, once Dickerson was satisfied that its condition had been met, it would be Dickerson which would withdraw its pleading. Contrary to the apparent (and plainly incorrect) assumption of the Opposers, Dickerson did not say that it would merely consent to the dismissal of its pleading as long as the Opposers (or anyone else besides Dickerson, for that matter) concluded that Dickerson's stated condition had been satisfied. As should be clear from the fact that Dickerson has not withdrawn its pleading to date, Dickerson is satisfied (for reasons clearly stated in Dickerson's Application for Review) that its condition has not been met.

5. The Opposers also argue that the decision in Mount Pleasant, Iowa, 10 FCC Rcd 12069 (PRD 1995), is somehow distinct from the instant case. In Mount Pleasant, a counterproposal filed after October 2, 1989, was dismissed because it did not comply with the channel separation requirements in effect after that date, even though the rule making proposal with respect to which the counterproposal was submitted had been filed prior to October 2, 1989. The underlying facts of the instant case are identical to those of Mount Pleasant: while the original proposal in this proceeding (i.e., to simply re-classify Channel 246 from Class A to Class C3 in Beverly Hills) was filed prior to October 2, 1989, the Opposers' counterproposal which was the

basis for the PRD's action (see Beverly Hills, et al., Florida, 8 FCC Rcd 2197, ¶2 (1993)) was filed more than three years after October 2, 1989. Thus, as was the case in Mount Pleasant, the counterproposal here was subject to the post-October 2, 1989 separation requirements.

6. The Opposers also claim that the PRD has not relied on the contour protection provisions of Section 73.215 to justify an allotment, in violation of the Commission's rules and policies. That claim, however, fails to grasp Dickerson's point (which Dickerson illustrated with the Escher drawing included in its Petition). At the risk of repetition, that point is as follows.

7. The allotment proceeding was fundamentally flawed. Dickerson raised those fundamental flaws in its Application for Review. Notwithstanding the pendency of that Application for Review -- and, therefore, the lack of any Commission consideration of Dickerson's arguments concerning the flaws in the allotment proceeding -- the Audio Services Division ("ASD") concluded that it could grant the Heart of Citrus application which specified the channel which had been allotted as a result of the plainly flawed allotment proceeding. The Heart of Citrus application could thus not have been granted if, as Dickerson has argued, the allotment proceeding was invalid, as the allotment would not otherwise have existed. But, blithely ignoring the pendency of Dickerson's Application for Review, the Audio Services Division granted the application -- and it did so solely on the basis of contour protection considerations.

8. Then, noting the ASD's grant of the Heart of Citrus application, the PRD concluded with facile circularity that Dickerson's Application for Review could be dismissed. In other words, the PRD justified its decision not to address and resolve Dickerson's arguments concerning the allotment process by relying on the ASD's grant of an application which could not have been made but for (a) the invalid allotment and (b) the contour protection provisions of Section 73.315.

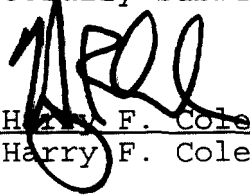
9. So if the allotment proceeding was, indeed, invalid -- as Dickerson has argued and continues to argue -- then the Heart of Citrus application could not have been granted. And if the Heart of Citrus application could not be granted, then the PRD's dismissal of Dickerson's Application for Review would also be invalid. Understandably, the Opposers don't bother to address this conundrum in their Opposition. Rather than attempt to acknowledge (much less respond) to the forest, they instead offer as distractions various arguments about this tree or that tree.

10. The bottomline of Dickerson's argument is that reasoned agency decisionmaking requires the Commission (and its various subordinate offices) to address, consider and rationally resolve arguments which are presented to it. In their actions at issue here, the PRD and the ASD engaged in everything but reasoned decisionmaking. Instead, they chose not even to address (much less to consider and rationally resolve) Dickerson's arguments simply by assuming those arguments out of existence. Of course, any argument can be easily and quickly resolved if one is willing

simply to assume away the problem. But that is not reasoned decisionmaking.

11. In view of the wholesale lack of reasoned decisionmaking by the PRD and the ASD, Dickerson renews its request that the decisions under consideration here be reconsidered and reversed.

Respectfully submitted,

  
/s/ ~~Harry F. Cole~~  
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July 5, 1996

# **CERTIFICATE OF SERVICE**

I, Harry F. Cole, hereby certify that on this 5th day of July, 1996, I caused copies of the foregoing "Reply of Dickerson Broadcasting, Inc. to 'Opposition to Petition for Reconsideration'" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

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